UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/606,896	06/29/2000	Kevin Vanfladern	MS154646.1/40062.69US03	7655

7590 11/13/2003	EXAMINER
Homer L. Knearl	BARAN, MARY C
Merchant & Gould P.C.	

ART UNIT	PAPER NUMBER
2857	

DATE MAILED: 11/13/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

	Application No.		Applicant(s)	
Office Action Summary	09/606,896		VANFLADERN ET AL.	
	Examiner		Art Unit	
	Mary Kate B Baran		2857	

-- *Th MAILING DATE of this communication appears on the cover sh et with the correspondence address* --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE _3_ MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed
  after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any
  earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on _15 September 2003_.

2a)☒ This action is **FINAL**.   2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is
closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) _1-31_ is/are pending in the application.

     4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☒ Claim(s) _16-31_ is/are allowed.

6)☒ Claim(s) _1-5_ is/are rejected.

7)☒ Claim(s) _6-15_ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on _29 June 2000_ is/are: a)☒ accepted or b)☐ objected to by the Examiner.

     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

     a)☐ All b)☐ Some * c)☐ None of:

         1.☐ Certified copies of the priority documents have been received.

         2.☐ Certified copies of the priority documents have been received in Application No. _____.

         3.☐ Copies of the certified copies of the priority documents have been received in this National Stage
application from the International Bureau (PCT Rule 17.2(a)).

     * See the attached detailed Office action for a list of the certified copies not received.

13)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application)
since a specific reference was included in the first sentence of the specification or in an Application Data Sheet.
37 CFR 1.78.

     a) ☐ The translation of the foreign language provisional application has been received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific
reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)   4) ☐ Interview Summary (PTO-413) Paper No(s). _____.

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)   5) ☐ Notice of Informal Patent Application (PTO-152)

3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.   6) ☐ Other: .

DETAILED ACTION

Response to Amendment

1.   The action is responsive to the Amendment filed on 15 September 2003. Claims

1-31 are pending. Claims 21 and 31 have been amended.

Double Patenting

2.   The nonstatutory double patenting rejection is based on a judicially created
doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the
unjustified or improper timewise extension of the "right to exclude" granted by a patent
and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11
F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225
USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA
1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*,
418 F.2d 528, 163 USPQ 644 (CCPA 1969).
      A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be
used to overcome an actual or provisional rejection based on a nonstatutory double
patenting ground provided the conflicting application or patent is shown to be commonly
owned with this application. See 37 CFR 1.130(b).
      Effective January 1, 1994, a registered attorney or agent of record may sign a
terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with
37 CFR 3.73(b).

Claims 1 and 2 are provisionally rejected under the judicially created doctrine of

obviousness-type double patenting as being unpatentable over claim 1 of copending

Application No. 09/606925 ("the '925 application").

Although the conflicting claims are not identical, they are not patentably distinct

from each other.

Claim 1 of the instant application recites: a computing system having a mass

storage device and a system timer for obtaining benchmark timing for a portion of an

application program execution, having a mass storage system, an init module for

determining if the timestamp data is to be collected during the operation of the

application program, a performance marker module for obtaining and storing the

timestamp data for later retrieval, an uninit module for formatting and storing the

obtained timestamp data into a data file within the mass storage device that permits

retrieval after the termination of the application program, and a performance benchmark

data post processing module for determining the benchmark timing from two or more

timestamp data entries, wherein the performance marker module is executed at

predefined points within a plurality of processing modules within the application

program.

Claim 2 of the instant application recites an init module executed before

timestamp data is collected, a performance marker module executed each time

benchmark timestamp data and overhead timestamp data is to be collected, an uninit

module executed after all timestamp data desired has been collected to store the

timestamp data within records of a Raw Data Table, and a performance benchmark

data post processing module which determines the benchmark timing from the records

stored within the Raw Data Table.

Claim 1 of the '925 application recites every limitation of the application claims 1

and 2, the only differences being that (a) the instant application stores the collected data

in a "Raw Data Table" whereas the '925 application stores its data in a "data file", and

(b) the instant application discloses that the performance marker module "is executed at

predefined points" to collect timestamp data, whereas the '925 application discloses that

"the performance marker module is executed each time benchmark timestamp data and

overhead timestamp data is to be collected".

There is no functional difference between storing the data in a "Raw Data Table",

as claimed in the instant application, or storing the data in a "data file" as claimed in the

'925 application. Similarly, there is no functional difference between executing the

performance module marker "at predefined points" (instant application) and executing

the performance marker "each time benchmark timestamp data and overhead

timestamp data is to be collected" ('925 application), as the "predefined points" (instant

application) would be located where timestamp data "is to be collected" ('925

application).

Claims 3-5 are provisionally rejected under the judicially created doctrine of

obviousness-type double patenting as being unpatentable over claims 2, 3, and 5 of

copending Application No. 09/606925 ("the '925 application"), respectively.

Although the conflicting claims are not identical, they are not patentably distinct

from each other.

Referring to claim 3, both the instant application and claim 2 of the '925

application recite an init module for determining if the timestamp data is to be collected.

Referring to claim 4, both the instant application and claim 3 of the '925

application recite an init module for determining if the timestamp data is to be collected

by checking for the existence of an identification key within a system registry, where the

identification key uniquely identifies the processing modules to be used to collect,

format, and store the run-time internal state data to be collected.

Referring to claim 5, both the instant application and claim 5 of the '925

application, disclose a performance marker module which collects timestamp data only

if the init module has determined that the timestamp data is to be collected.

Claims 3-5 are dependent on claims 1 and 2, and therefore the same reasons for

obviousness apply. There is no functional difference between storing the data in a "data

file" (instant application) or storing the data in a "Raw Data Table" ('925 application), nor

is there functional difference between executing the performance module marker "at

predefined points" (instant application) and executing the performance marker "each

time benchmark timestamp data and overhead timestamp data is to be collected" ('925

application).

This is a <u>provisional</u> obviousness-type double patenting rejection because the

conflicting claims have not in fact been patented.

Allowable Subject Matter

3.   Claims 6-15 are objected to as being dependent upon a rejected base claim, but

would be allowable if rewritten in independent form including all of the limitations of the

base claim and any intervening claims.

4.   Claims 16-31 are allowed.

5.   The following is a statement of reasons for the indication of allowable subject

matter:

Claims are allowable over the prior art because, obtaining benchmark timing for a

portion of an application program execution by permanently inserting performance

markers within an application program, and using an init module to determine if data

should be collected at the performance marker is not found, taught or suggested in the

prior art of record.

Response to Arguments

6.   Applicant's arguments have been fully considered and are persuasive. The prior

35 U.S.C. 102 and 35 U.S.C. 103 rejections with regards to claims 1-31 have been

withdrawn.

Conclusion

7.   **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time

policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE

MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later

than SIX MONTHS from the mailing date of this final action.

8.   Any inquiry concerning this communication or earlier communications from the

examiner should be directed to Mary Kate B Baran whose telephone number is (703)

305-4474. The examiner can normally be reached on Monday - Friday from 8:00 am to

5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's

supervisor, Marc S Hoff can be reached on (703) 308-1677. The fax phone number for

the organization where this application or proceeding is assigned is (703) 872-9318.

Any inquiry of a general nature or relating to the status of this application or

proceeding should be directed to the receptionist whose telephone number is (703) 308-

1782.

MKB

MARC S. HOFF
SUPERVISORY PATENT EXAMINER
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